STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL JOHN MONTE and JOANNE MONTE, Plaintiff-Appellees, v TOYOTA MOTOR CORPORATION, TOYOTA MOTOR SALES U.S.A., INC., Defendant-Appellants.	UNPUBLISHED September 28, 2001 No. 220671 Oakland Circuit Court LC No. 96-517602-NP
MICHAEL JOHN MONTE and JOANNE MONTE, Plaintiff-Appellees, v TOYOTA MOTOR CORPORATION, TOYOTA MOTOR SALES U.S.A., INC., Defendant-Appellants.	 No. 220983 Oakland Circuit Court LC No. 96-517602-NP

Before: Cavanagh, P.J., and Zahra and K.F. Kelly

PER CURIAM.

In this products liability action, defendants Toyota Motor Corporation (hereinafter "TMC") and Toyota Motor Sales, U.S.A., Inc. (hereinafter "TMS") appeal as of right from the trial court's decision denying their motion for judgment notwithstanding the verdict.[1] We reverse.

[1] Defendants raise other issues aside from the trial court's failure to grant their motion JNOV. In light of our disposition, we need not address the other issues raised.

I. Background and Procedural History

Plaintiffs Michael and Joanne Monte leased a 1994 Toyota Camry, manufactured by defendant TMC and sold by defendant TMS. When plaintiffs leased the 1994 Camry, airbags were not a required feature. According to plaintiffs, the vehicle's airbag system and the protection that it offered in addition to the seatbelt was their primary motivation for leasing the Camry. Within twenty-four hours of leasing the vehicle, plaintiffs read about the airbag system in the Owner's Manuel and Owner's Guide, both of which were provided to plaintiffs along with the automobile.

The Owner's Guide states:

> In addition to seat belts, many Toyota vehicles are equipped with both driver's and passenger's side supplemental restraint systems (SRS airbags). Airbags have been designed to supplement the three-point seat belt by providing additional protection by restraining the forward motion *in the event of a more serious frontal accident*. [Emphasis added.]

Further, the Owner's Manual states:

> The SRS (Supplemental Restraint System) airbags are designed to be activated *in response to a severe frontal impact* . . . to provide the driver and front passenger with further protection in addition to the primary protection provided by the seat belts. [Emphasis added.]
>
> The SRS airbag system is not designed to protect the driver and front passenger from an impact from the side or rear, a vehicle overturn or *frontal collision at low speeds*. [Emphasis added.]

On March 17, 1995, plaintiff Michael Monte[2] was involved in an automobile accident. Although plaintiff was wearing his seat belt, the airbag did not deploy upon impact. Plaintiff claims that the impact was indeed "severe" and that as a result of the airbag's failure to deploy he sustained serious injuries to his cervical spine and the lower lumbar region of his back.

Plaintiffs filed a complaint alleging breach of express warranty, breach of implied warranty, negligence and Mrs. Monte's derivative claim for loss of consortium. Before trial however, plaintiff voluntarily dismissed his claims for negligence and breach of implied warranty, electing only to proceed on the claim for breach of express warranty.

At trial, defendants' primary position was that the airbag in plaintiff's vehicle was not defective in either manufacture or design. Defendants maintained that the airbag did not deploy in response to plaintiff's collision because the airbag was neither designed nor manufactured to deploy in low speed collisions. In fact, before all of the repairs on plaintiff's vehicle were

[2] Because Joann Monte's claim for loss of consortium is a derivative cause of action, the singular "plaintiff" refers to plaintiff Michael Monte unless otherwise specified.

complete, defendant Mel Farr Imports, Inc. conducted a test on the airbag system in plaintiff's vehicle, which revealed that the airbag system was *fully operational*; i.e. free of any "defect." From the time that plaintiffs leased the vehicle up until and since the accident, plaintiffs never had the airbag replaced or otherwise repaired.

After the trial, the jury returned its verdict in plaintiffs' favor in the amount of $225,778.39. After the judgment was entered, defendants filed, among other things, its motion for judgment notwithstanding the verdict (JNOV). The trial court denied the relief requested by defendants. Defendants appeal as of right arguing that plaintiff failed to establish a prima facie case of products liability in general and breach of an express warranty in particular.

II. Motion for Judgment Notwithstanding the Verdict

Defendants argue that the trial court committed error requiring reversal when it denied defendants' motion for JNOV. We agree. This Court reviews a trial court's decision with regard to a motion for JNOV de novo. *Morinelli v Provident Life and Acc Ins Co*, 242 Mich App 255, 260; 617 NW2d 777 (2000). A motion for JNOV should be granted only when, viewing the evidence and all legitimate inferences in a light most favorable to the nonmoving party, there remain no issues of material fact upon which reasonable minds could differ. *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 14; 596 NW2d 620 (1999) (citations omitted.) As the court stated in *Morinelli*, "[i]f reasonable jurors could have honestly reached different conclusions, the jury verdict must stand." *Morinelli, supra* at 260-261.

A. Products Liability

Defendants first argue that plaintiffs failed to establish a *prima facie* products liability case because there was no showing that the airbag system in plaintiffs' vehicle was "defective" either in manufacture or design.

Products liability action is defined in MCL 600.2945 as follows:

> (h) "Product liability action" means an action based on a legal or equitable theory of liability brought for the death of a person or for an injury to a person or damage to property caused by or resulting from the production of a product.
>
> (i) "Production" means manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, inspection, testing, listing, certifying, warning, instructing, marketing, selling, advertising, packaging, or labeling.

In order to set forth a *prima facie* case, a plaintiff has the burden of establishing, either directly or by circumstantial evidence, that defendant "supplied a product that was *defective* and that the defect caused the injury." *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 534; 556 NW2d 528 (1996). [Emphasis added.] The gravamen of a products liability case on a theory of breach of an express warranty is an injury caused by a *defect* in *design or manufacture* such that the product does not perform as expressly warranted. *Scott v Illinois Tool Work, Inc*, 217 Mich App 35; 550 NW2d 809 (1996).

To establish a design defect, a plaintiff must prove "evidence of the magnitude of risk posed by the design, alternatives to the design, or other factors concerning the unreasonableness of a particular design." *Lawrenchuk v Riverside Arena, Inc.*, 214 Mich App 431, 435; 542 NW2d 612 (1995) (citing *Owens v Allis-Chalmers Corporation*, 414 Mich 413; 326 NW2d 372 (1982)). In determining the existence of a defect, "the trier of fact must balance the risk of harm occasioned by the design against the design's utility." *Id.* at 435-436 (*citing Prentis v Yale Manufacturing Company*, 421 Mich 670; 365 NW2d 176 (1984)). To prove a manufacturing defect, a plaintiff must prove a defect attributable to the manufacturer. *Chalmers v General Motors Corporation*, 123 Mich App 619, 621; 333 NW2d 9 (1982). A plaintiff satisfies this burden when the plaintiff "demonstrates by a reasonable probability, that the defect is attributable to the manufacturer and that such hypothesis is more probable than any other hypothesis reflected by the evidence." *Id*. See also *Holloway v General Motors Corp*, 399 Mich 617; 250 NW2d 736 (1977) and *Kupkowski v Avis Ford Inc*, 395 Mich 155; 235 NW2d 324 (1975) (both recognizing that to establish a *prima facie* case of breach of warranty in products liability and thus avoid a directed verdict, plaintiffs, `must prove a defect attributable to the manufacturer (or seller) and a causal connection between that defect and the injury or damage of which he complains.'). (Citations omitted.)

The crucial issue in the case at bar is whether plaintiff satisfied his initial burden of proving the requisite "defect" necessary to sustain his cause of action in products liability. A careful review of the record establishes plaintiff did not produce any evidence at trial to establish that indeed, the airbag in plaintiff's vehicle had a "defect" that caused the product to fail and thus cause plaintiff's injuries. Antithetically, defendant presented evidence that the airbag functioned as designed and manufactured respecting all applicable Federal Motor Vehicle Safety Standards relative to airbags thus establishing the absence of any inherent defect attributable to the manufacturer. Plaintiffs failed to counter this evidence. The only "defect" identified by plaintiffs is that the airbag did not deploy under circumstances under which plaintiffs *thought* that it should *irrespective* of how the airbag is manufactured or designed. Plaintiff's mere expectations as a consumer are not sufficient in and of themselves to sustain an action in products liability. Absent an identifiable defect, recovery in products liability does not and cannot lie.

Plaintiff points out that there need not be direct evidence of a defect to sustain a cause of action in products liability and that the requisite "defect" may be established by circumstantial evidence. Indeed, the trier of fact may infer a defective condition "from circumstantial evidence alone." *Severn v Sperry Corp*, 212 Mich App 406, 413; 538 NW2d 50 (1995). However, as the *Holloway* court specifically noted, the burden to prove a defect and a causal connection to the injury always remains with the plaintiff. The defendant never has the burden to prove a non-defect. *Holloway*, 399 Mich 617 at 739.

B. Breach of Express Warranty

Defendants also argue that plaintiff failed to prove the specific elements to establish a breach of express warranty. We agree. MCL 440.2313 provides in pertinent part that:

> (1) Express warranties by the seller are created as follows:

> (a) An affirmation of fact or promise made by the seller to the buyer which relates to the goods and *becomes part of the basis of the bargain* creates an express warranty that the goods shall conform to the affirmation or promise. [Emphasis added.]
>
> (b) A description of the goods *which is made part of the basis of the bargain* creates an express warranty that the goods shall conform to the description. [Emphasis added.]

The "affirmation" that comprises the express warranty at issue in the case at bar derives collectively from the Owners Manuel and the Owners Guide both provided to plaintiffs upon leasing the vehicle. Although plaintiff testified that the SRS airbag system was the primary reason that he ultimately leased the vehicle from defendants, plaintiff could not have relied on *any* of the statements included in either the Owner's Manuel or Owner's Guide considering that he received both *after* the bargain was already struck.[3]

Viewing all of this evidence and all legitimate inferences drawn therefrom, in a light most favorable to plaintiffs, a complete review of the record indicates that plaintiff failed to establish a "defect attributable to the manufacturer" which is vital to plaintiffs claim sounding in products liability. *Kupkowski v Avis Ford, Inc*, 395 Mich 155, 161; 235 NW2d 324 (1975); *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 510; 556 NW2d 528 (1996). Accordingly, we find that the trial court committed error requiring reversal by failing to grant defendants' motion for JNOV. In light of our disposition, we need not address the remaining issues raised on appeal.

Reversed and remanded for entry of an order consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly

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[3] We do note that the warranties contained in defendants' Owner's Manual and Owner's Guide were indeed ambiguous. In this case, the "defect" was really the nebulous warranty itself which may form the basis of a claim sounding in contract. However, in this case, even if plaintiff stated a claim based in contract, plaintiff's claim would still fail for lack of reliance.